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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH 13 JUN 1977

ROY S. LUDLOW INVESTMENT  
COMPANY,

Plaintiff-Respondent,

-vs-

SALT LAKE COUNTY, et al.,

Defendants-Appellants.

\* \* \*

CONSOLIDATED FREIGHTWAYS  
CORPORATION OF DELAWARE,

Plaintiff in Intervention,

-vs-

SALT LAKE COUNTY,

Defendant in Intervention.

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Case No. 14523

14253

FILED

JAN 8 1976

Clerk, Supreme Court, Utah

BRIEF OF DEFENDANT-APPELLANT SALT LAKE COUNTY

An Appeal From The Judgment Entered In The Third Judicial  
District Court, In And For Salt Lake County, State of Utah  
The Honorable Stewart M. Hanson, Judge, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROY S. LUDLOW INVESTMENT  
COMPANY,

Plaintiff-Respondent,

-vs-

SALT LAKE COUNTY, et al.,

Defendants-Appellants.

\* \* \*

Case No. 189102

CONSOLIDATED FREIGHTWAYS  
CORPORATION OF DELAWARE,

Plaintiff in Intervention,

-vs-

SALT LAKE COUNTY,

Defendant in Intervention.

---

BRIEF OF APPELLANT SALT LAKE COUNTY

---

NATURE OF CASE

The original action in this case was an action in trespass against Salt Lake County by respondent to compel Salt Lake County to remove a road which respondent claimed was built on his land by Salt Lake County. After judgment was rendered in respondent's favor in the original action, respondent filed a supplemental complaint in trespass against Salt Lake County to recover the value of the road built by Salt Lake County which was removed by Salt Lake County from respondent's property after

the original judgment was entered.

#### DISPOSITION IN LOWER COURT

The lower court found Salt Lake County liable in the amount of \$12,532.10

#### RELIEF SOUGHT ON APPEAL

Appellant Salt Lake County seeks reversal of the lower court's judgment against Salt Lake County and for judgment dismissing respondent's supplemental complaint. In the alternative, Salt Lake County seeks reversal of the lower court's judgment and remand for a new trial on the issue of damages.

#### STATEMENT OF FACTS

In September of 1969, respondent brought the original action herein against Salt Lake County, alleging that it had trespassed on his land, creating a nuisance by building a public road across his land located in the Mountain View Subdivision. R-1. He asked in the complaint that the County remove the road. R-4. Several utilities were also joined as defendants. In addition, Consolidated Freightways intervened as a plaintiff against Salt Lake County. The road was located at 3200 West south of 2100 South. It was built by Salt Lake County in 1969. The street was dedicated as part of the Mountain View Subdivision, which was recorded in 1888. On August 11, 1971, the District Court entered judgment against Salt Lake County, holding that 3200 West had been abandoned under Section 1116, Laws of Utah (1898), which provided that a highway was deemed abandoned

which was not worked or used for a period of five years.

R-80-82. The court ordered the road left open to the public in order that the County could file condemnation proceedings, but if the County did not condemn, the respondent could apply to the court for appropriate relief. R-82. That decision was affirmed by the Utah Supreme Court on July 14, 1972. R-199.

On October 18, 1972, Salt Lake County employees, using heavy equipment, removed the road from respondent's property and placed it on County property. T. 286-290. On March 16, 1973, respondent filed a motion to file a supplemental complaint, alleging damages for removal of the road by Salt Lake County. On March 26, 1973, respondent's motion was granted. R-235. Subsequent motions by Salt Lake County to dismiss the supplemental complaint and for judgment on the pleadings were denied. R-241. Trial was held in the supplemental complaint on August 11, 1975, at which time the lower court awarded respondent damages in the amount of \$12,532.10, the cost to replace the road. Respondent testified the actual damage he suffered was \$300.00 the cost of replacing some survey markers. T. 292-295. The damages were based upon a finding that the County was negligent. R-270. After the trial, respondent amended his complaint to allege negligence. R-263. It is from this judgment and the denial of appellant's motions to dismiss and for judgment on the pleadings that Salt Lake County appeals.



## ARGUMENT

### POINT I

RESPONDENT'S CLAIM FOR DAMAGES IS NOT WAIVED UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT.

Section 63-30-3 of Utah's Governmental Immunity Act provides that governmental entities are immune from suit except as provided under the Act. This court has stated that the Governmental Immunity Act is to be strictly applied to preserve the sovereign immunity and to waive it only as clearly expressed in the Act. Holt v. State Road Commission, 30 U.2d 4, 511 P.2d 1287 (1973).

Utah Code Annotated 63-30-10, 1965, provides as pertinent:

"WAIVER OF IMMUNITY FOR INJURY CAUSED BY NEGLIGENT ACT OR ADMISSION OF EMPLOYEE--  
EXCEPTIONS--Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or admission of an employee committed within the scope of his employment except if the injury:

- (1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or
- (2) Arises out of . . . intentional trespass . . . ."

The meaning of the phrase "discretionary function" in the Utah Governmental Immunity Act, which is patterned after the Federal Torts Claims Act (U.S.C. 2680), has been construed by the courts numerous times. An act is considered a discretionary act within the meaning of the Governmental Immunity Act when it

requires deliberation and judgment and is made at a planning level rather than at the operational level where an act amounts only to carrying out decisions made at the planning level.

Velasquez v. Union Pacific Railroad Co., 24 U.2d 217, 469 P.2d 888 (1972); Carroll v. State, 27 U.2d 384, 496 P.2d 888 (1972); U.S. v. Gregory, 300 F.2d 11 (10th Cir. 1962).

An important factor this court has considered in determining whether an act is discretionary is whether or not the decision is made at the level of government where basic governmental planning decisions are made.

Thus, in Velasquez v. Union Pacific Railroad Co., supra, a decision by the Public Service Commission as to the type of safety devices it required the railroads to use was held to be a discretionary act and immune from suit under the Governmental Immunity Act because it was a basic planning decision made by the governmental body authorized to make such decisions. The court noted the fact that the statute in question gives the Public Service Commission the power to require railroads to construct and maintain appropriate safety devices shows a legislative intent to confer a discretionary act on the Public Service Commission. However, the case of Carroll v. State Road Commission, supra, the Court held that a decision of a road supervisor to use earthen beams rather than signs as a means of protecting drivers from an abandoned road was a decision at the operational level. The court emphasized that the decision

was not a basic planning decision of the Road Commission itself:

"In the instant action, the decision of the road supervisor to use beams as the sole means of protection for the unwary traveler was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program or objective. His decision did not require the exercise of basic policy evaluation, judgment, and expertise on the part of the Road Commission."

In the case herein, the decision to remove the road by the County was made in a conference between the Salt Lake County Commissioners and a member of the Salt Lake County Attorney's Office, who indicated that the County had three alternatives under the judgment of the court--to negotiate purchase of the land, to condemn the land, or to remove the road and place it on County property. (Deposition of Commissioner Ralph McClure, admitted into evidence, pp. 6-12). The judgment of the County Commission was to remove the road. The decision was a planning decision by the governing body of the County and its legal advisor and certainly was a discretionary act of judgment. This very act of removing the road is the basis of respondent's suit and not the operational manner in which it was removed. Thus, appellant Salt Lake County would submit it is immune from suit under the Governmental Immunity Act for the decision of the County Commission to remove the road if there was any negligence in such decision. If, on the other hand, the act of removing the road is construed as an intentional trespass because County employees went on the land of respondent,

knowing the land was his, although believeing they had a right to do so, then the act is still not waived under the Governmental Immunity Act.

## POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING RESPONDENT TO FILE A SUPPLEMENTAL COMPLAINT AFTER JUDGMENT AND APPEAL OF THE ORIGINAL CASE.

The purpose of Rule 15(d) of the Utah Rules of Civil Procedure, which is identical to Rule 15(d) of the Federal Rules of Civil Procedure, is to allow a party to file a supplemental pleading to include transactions that have occurred since the original complaint. Supplemental complaints have been held proper even after judgment and appeal if the result of a supplemental complaint would not be to reopen a case. A good example of this is the case of North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 23 U. 199, 63 P. 812 (1901), where the court upheld a supplemental complaint which was filed after an appeal had reversed a lower court judgment in a case where the issue of damages was reserved and further proceedings were already in order.

However, supplemental pleadings have not been allowed where the result would be to open a case after trial. Thus, in Ebel v. Drum, 55 Fed. Supp. 186 (D. Mass. 1964), the court denied a motion of plaintiffs therein to file a supplemental complaint under Rule 15(d) of the Federal Rules of Civil Procedure where the result would have been to reopen the case:

"Further, I do not believe the case should be reopened where, as here, it has been fully tried and a decree ordered but not filed."

Similarly, where the supplemental complaint would allow new relief after final disposition of a matter, it has been held improper. Brill v. General Industries, 234 F.2d 465 (3d Cir. 1956).

The reasons for denying a supplemental complaint in this case are even more persuasive than in the cases cited. Here, final judgment had been entered by the trial court and affirmed by the Utah Supreme Court. If a supplemental complaint were proper after final disposition of a case by an appellate court where the case was not remanded for a new trial or further proceedings, then a case would never end as a party would continue litigation indefinitely through supplemental pleadings.

### POINT III

RESPONDENT IS ESTOPPED FROM SEEKING DAMAGES FOR THE REMOVAL OF THE ROAD, HAVING ELECTED TO HAVE THE ROAD REMOVED.

Paragraph 10 of respondent's First Cause of Action of the original complaint against the County reads as follows:

"10. That the said defendant has and is trespassing upon plaintiff's property and has and is creating a public way across plaintiff's property and as such has created a nuisance, which nuisance should be abated and the defendant restrained and enjoined from further creating and maintaining said nuisance." R-3.

The prayer in respondent's original complaint reads:

"That the court order the defendant Salt Lake County to abate the nuisance and remove the roadway from across plaintiff's property." R-4.

Respondent did not ask for damages for the road being on his land, or did he introduce any evidence of damage at trial. The judgment provides that Salt Lake County should condemn or other appropriate relief will be granted. Because damages were not claimed, the only appropriate relief would have been for the court to order the road removed. There is a well established principal of law that one is estopped from seeking inconsistent remedies for a wrong. Midvale Motors, Inc. v. Sanders, 19 U.2d 403, 432 P.2d 37 (1967); Farmers & Merchants Bank v. Universal C.I.T. Credit Corp., 4 U.2d 155, 289 P.2d 1045 (1955). That is exactly what respondent has done in this case. First, he sued the County to remove the road, and then when the County removed the road, he sued for removing the road. The two actions are inconsistent and, therefore, respondent should be estopped under the doctrine of res judicata from prevailing on the supplemental complaint.

#### POINT IV

THE COUNTY HAD AN EQUITABLE RIGHT IN THE ROAD ASIDE FROM THE FACT RESPONDENT ASKED SALT LAKE COUNTY IN HIS COMPLAINT TO REMOVE IT.

Although generally under the common law, improvements placed upon the land belong to the owner of the land, there are exceptions to this rule. Under the Occupying Claimants Act, Utah Code Annotated 57-6-1, et seq., a landowner who, under color of title and in good faith, places an improvement upon another's land, may sue to recover the value

of the improvement. Generally, such statutes are not exclusive remedies [Citizens & Southern National Bank v. Modern Homes Construction, 149 S.E.2d 326 (S. C. 1966); Tolson v. Madison, 307 S.W.2d 32 (Mo. 1957); Pritchard Petroleum Co. v. Farmers Co-Op Oil and Supply Co., 190 P.2d 55 (Mont. 1938)], and under the common law, equity will not allow a landowner to be unjustly enriched by improvements on his own land placed by another and will permit a suit in equity to remove improvements by one who has mistakenly placed them on another man's land. Citizens & Southern National Bank v. Modern Homes Construction, supra; Salazar v. Garcia, 222 S.W.2d 685 (Tex. App. 1950); Tolson v. Madison, supra. The exception to the common law principle is stated in Citizens & Southern National Bank v. Modern Homes Construction Co., supra, as follows:

"If the plaintiff is allowed to remove the building, the defendant would be deprived of nothing to which he is unjustly enriched and would be compensated for any damage that might result from the removal of the building. Both parties would be made whole. It would be clearly inequitable, under the facts alleged, to allow the defendant to be enriched by the construction of the building on his land . . . ."

Defendant Salt Lake County did not avail itself of either of these remedies because it believed it was already obligated to remove the road under the judgment if it did not condemn. However, even if it misconstrued the judgment, plaintiff should not be unjustly enriched by receiving \$12,000.00 for a road

which cost him nothing and which had no value as an improvement on respondent's land. Rather, damages should be limited to any damage to respondent's land from the removal of the road.

#### POINT V

DAMAGES AWARDED BY THE TRIAL COURT WERE EXCESSIVE AND IMPROPERLY MEASURED.

The trial court awarded damages solely on the basis of testimony by respondent's expert as to what the cost to replace the road was estimated to be. No evidence was introduced by respondent that the road was of any value to him or that its removal decreased the value of his property. Even assuming that Salt Lake County misconstrued the pleadings and judgment in respondent's original lawsuit and had no right to remove the road, and further assuming that the County had no equitable claim to the road, the court still granted excessive damages which were improperly measured.

No single measure of damages has been applied in cases where structures on real property have been destroyed. The proper measure of damage for damage to improvements on real property is often the difference between the value of the land before and after the damage. The basic goal of the courts in such cases is to award such amount of money as to restore the injured party to the same property status which he occupied immediately prior to the injury. Alonzo v. Hills, 95 Cal. App.2d 788, 214 P.2d 50; McCabe v. Parkersburg, 138 W. Va. 830,



79 S.E.2d 87 (1953); 22 Am. Jur.2d Damages § 138. When courts have allowed a different measure of damages to be used other than change in value in the land, it has been to get more directly at the damage done. In this case, measuring damages in any way other than the change in value in the land would have just the opposite effect--that of giving respondent a windfall at the expense of the taxpayers of Salt Lake County. The road cost respondent nothing, he asked that it be removed, he offered no evidence that its removal damaged him in any way, other than removal of some survey stakes, or that the road in any way benefited his land. In essence, he has been unjustly enriched in the amount of \$12,532.10. To avoid such a result, damages should have been awarded on the basis of the change in the value of respondent's land by the removal of the road. A good analogy to this situation is the method of determining the value of an improvement under the Occupying Claimants Act. Under that Act, the value of improvements mistakenly placed on another's land when one is claiming the value of such improvement is "a difference between the reasonable relative values of the land with and without the improvements". Reimann v. Baum, 115 U. 147, 203 P.2d 387 (Utah 1949). In that case the court stated:

"The reasonable cost of the improvements alone is not sufficient evidence of value but such cost may be considered with all other evidence of value in determining the increase in value of the land on account of the improvements. The obvious reason of this rule is to limit liability of a landowner on whose land an improvement

has been placed by another by mistake to the amount he has been unjustly enriched."

Here, the same principle is applicable in reverse. To allow respondent to recover \$12,000.00, the cost of the road, where he has shown no actual damage to his land and where the road cost him nothing, is to unjustly enrich him and is an excessive finding as to damage not warranted by the evidence.

#### CONCLUSION

The award by the trial court of damages against Salt Lake County in excess of \$12,000.00, when no evidence was presented to the trial court of any actual loss suffered by respondent, is tantamount to an award of punitive damages against the public for the discretionary act of the County Commissioners of removing a road which respondent had asked the County to remove in his original complaint. Appellant Salt Lake County would submit that this result is not supportable under the law for numerous reasons. First, because the act of the County was in compliance with the prayer in respondent's complaint and the judgment, the County was entitled, if not obligated, to remove the road under the pleadings and judgment of the original case and, therefore, respondent is estopped under the doctrines of election of remedies and res judicata from the subsequent lawsuit. Secondly, because the act was a discretionary act on the part of the Commissioners, the County is protected from lia-

bility under the Governmental Immunity Act. Further, there is no evidence of any negligence on the part of the officials of the County in the decision to remove the road, and it was improper for the court to make a finding of negligence when the case was not even tried on the theory of negligence.

Even if the supplemental complaint was proper, the damages awarded to respondent have no relationship to any actual damage he suffered. Because the road cost respondent nothing and there is no evidence that it benefited his land in any way, damages should be limited to any damage done to his property in removing the road to avoid unjustly enriching him at the expense of the County. In the alternative, the court should have awarded damages on the basis of the decrease in the value of respondent's land instead of on the basis of the cost of replacing the road.

For these reasons, appellant Salt Lake County asks that the judgment of the lower court be reversed.

Respectfully submitted,

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